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No. 02-1028

In The

Supreme Court of the United States

NORFOLK SOUTHERN RAILWAY COMPANY,

Petitioner,

v.

JAMES N. KIRBY PTY LIMITED D/B/A/ KIRBY ENGINEERING AND ALLIANZ AUSTRALIA LIMITED,

Respondents.

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On Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

BRIEF OF PROFESSOR MARTIN DAVIES AS *AMICUS CURIAE* IN SUPPORT OF THE RESPONDENTS

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QUESTION PRESENTED

This brief is limited to Question 1 in the Petition for Writ of Certiorari. That question is as follows:

> Whether a cargo owner that contracts with a freight-forwarder for transportation of goods to a destination in the United States is bound by the contracts that the freight forwarder makes with carriers to provide that transportation.

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INTEREST OF *AMICUS CURIAE*[1]

Amicus curiae Martin Davies is the Admiralty Law Institute Professor of Maritime Law at Tulane University. He has no financial interest in this case. He has written extensively on maritime law in the United States and Australia. He is a member of the Maritime Law Association of the United States and the Maritime Law Association of Australia and New Zealand.

Amicus has a particular interest in the issue raised by Question 1 of the Petition for Writ of Certiorari. He first addressed it in an academic writing in Australia in 1991,[2] and returned to consider it in the second edition of his treatise on Australian shipping law in 1995.[3] The third edition of that treatise, to be published in 2004, will contain an expanded consideration of the issue.

Amicus considered the U.S. law on the role of NVOCCs in an article published in the Tulane Law Review in 2000.[4] Part of that article was quoted with approval by

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[1] This brief as *amicus curiae* is submitted on behalf of Martin Davies. The parties have filed with the Court letters consenting to the filing of *amicus* briefs. In accordance with Supreme Court Rule 37.6, *amicus* certifies that this brief was authored by *amicus* and not, in whole or in part, by counsel for either party, and no person or entity, other than *amicus* and counsel submitting this brief on behalf of *amicus*, has made a monetary contribution to the preparation or submission of this brief.

[2] Martin Davies, *The Elusive Carrier: Whom Do I Sue and How?*, 19 AUST. BUS. L. REV. 230 (1991).

[3] MARTIN DAVIES & ANTHONY DICKEY, SHIPPING LAW v, 167-69, 337-340 (2d ed. 1995). The third edition of this treatise will be published in 2004; the issue is considered in that edition, also.

[4] Martin Davies, *In Defense of Unpopular Virtues: Personification and Ratification*, 75 TUL. L. REV. 337 (2000).

the U.S. Court of Appeals for the Ninth Circuit in *Kukje Hwajae Ins. Co. Ltd. v. M/V HYUNDAI LIBERTY,* 294 F.3d 1171, 1176 (9th Cir. 2002), *petition for cert. pending sub nom. Green Fire & Marine Ins. Co. Ltd. v. M/V HYUNDAI LIBERTY,* No. 02-813 (filed Nov. 22, 2002), to support a conclusion that conflicts with that of the U.S. Court of Appeals for the Eleventh Circuit in the present case on the issue presented by Question 1. In the present case, Petitioner cited *amicus'* Tulane Law Review article in its Petition for a Writ of Certiorari[5] and in its Brief on the Merits.[6] With due respect to the Ninth Circuit Court of Appeals and to Petitioner, the article does not support an affirmative answer to Question 1, as both suggest that it does.[7]

SUMMARY OF ARGUMENT

Question 1 cannot be given a uniform answer, positive or negative, that will apply in all cases as a matter of law. The term "freight forwarder" is sometimes used to describe

[5] Petition for Writ of Certiorari, p. 21.

[6] Brief of Petitioner, p. 38.

[7] Petitioner also misinterprets *amicus'* article as supporting the proposition that the vessel carrier "will often have no idea whether its shipper is a forwarder or owner." Brief of Petitioner, p. 38. The relevant passage says: "[T]he ocean carrier may have no idea that the person to whom it issued its bill is in fact an NVOCC that has issued bills of lading itself." Martin Davies, *In Defense of Unpopular Virtues: Personification and Ratification*, 75 TUL. L. REV. 337, 396 (2000). *Amicus'* point is that the ocean carrier may have no idea that the NVOCC has issued bills of lading itself, not that the ocean carrier may have no idea that it is dealing with an NVOCC.

an intermediary who contracts with a carrier as agent for the cargo owner, and sometimes to describe an intermediary who contracts as principal to carry the cargo owner's goods, then sub-contracts to other carriers. Question 1 could be answered affirmatively for the first type of intermediary, but not the second. An NVOCC who contracts as principal cannot be regarded as the cargo owner's agent in the strict sense of someone who is authorized to contract with others on the principal's behalf, because none of the usual indicia of true agency are present in the relationship between cargo owner and NVOCC. To bind the cargo owner to the NVOCC's contract with the ocean carrier always and in every case would have undesirable consequences, because it would mean that the cargo owner would have two carriage contracts and thus two freight obligations for one movement of its goods.

ARGUMENT

I. The answer to Question 1 depends upon the meaning of the term "freight forwarder" and the circumstances of the agreement between the cargo owner and the "freight forwarder."

The answer to Question 1 depends in large part on the meaning of the phrase "freight forwarder," which is not used uniformly in international shipping practice.

In the United States, Congress has defined the term "freight forwarder" to mean an intermediary who books or arranges carriage on behalf of cargo owners and processes the relevant documentation. 46 U.S.C. app. §1702(17)(A); 46 C.F.R. §515.2(o)(1). The term "non-vessel-operating common carrier" or NVOCC is defined as an intermediary

that undertakes as principal to carry the cargo owner's goods itself, but which sub-contracts carriage to vessel-operating common carriers (VOCCs). 46 U.S.C. app. §1702(17)(B); 46 C.F.R. §515.2(o)(2). Freight forwarders and NVOCCs share the quality of being interposed between the cargo owner and the VOCC, so Congress described them generically as "ocean transportation intermediary." 46 U.S.C. app. §1702(17); 46 C.F.R. §515.2(o). However, the statutory definitions make it clear that these are intermediaries of very different kinds so far as their contractual undertakings to the cargo owner are concerned. A "freight forwarder" merely undertakes to arrange carriage for the cargo owner and to process the relevant documentation. An NVOCC contracts to carry the cargo owner's goods to their destination.

Outside the United States, the term "freight forwarder" is used generically, in the way that the U.S. Code and Code of Federal Regulations use the term "ocean transportation intermediary." In other countries, it is quite possible for an entity called a "freight forwarder" to contract as principal with both the cargo owner and the ocean carrier who actually carries the goods to their destination. That is certainly true in Australia, where International Cargo Control Pty Ltd, the "freight forwarder" in the present case, carries on business. For example, in *Comalco Aluminum Ltd v. Mogal Freight Services Pty Ltd* (1993) 113 A.L.R. 677, the Federal Court of Australia said of the defendant that it "carries on business as a freight forwarder." *Id.* at 678. The Federal Court nevertheless went on to hold that the defendant was the carrier of the plaintiff's goods for the purposes of the Carriage of Goods by Sea Act 1991 (Austl.) (Australia's enactment of the Hague-Visby Rules), that the "consignment note" it had issued was a contract of carriage, and

that exclusion clauses in that carriage contract protected the defendant from liability in its capacity as carrier. *Id.* at 679-683, 695-700. The court specifically rejected the argument made on behalf of the defendant "freight forwarder" that it had entered into the contract with the ocean carrier as agent for the plaintiff and not as principal. *Id.* at 697.

Similarly, in *The CHITRAL* [2000] 1 Lloyd's Rep. 529 (Q.B.), the Commercial Court of the Queen's Bench Division in England considered the effect of a bill of lading issued to the cargo owner by an entity (IASC) that it described as "German freight forwarders." *Id.* at 530. The court noted that IASC was the contracting carrier under its bill of lading and that a court in Bremen, Germany had held that IASC's liability as carrier was "beyond question." *Id.* at 530, 532. This was so despite the fact that IASC had contracted with, and received a bill of lading from, the ocean carrier who had actually carried the goods. *Id.* at 530. Also, in *The BRIJ* [2001] 1 Lloyd's Rep. 431 (H.K.H.C.), an entity described by the court as "a freight forwarder" issued its own bill of lading to the plaintiff cargo owner and contracted with, and received a bill of lading from, the ocean carrier who actually carried the goods. *Id.* at 433. The Hong Kong High Court held that the cargo owner's contract of carriage was with the "freight forwarder," not the ocean carrier. *Id.* at 434-35.

In other cases, a "freight forwarder" outside the United States may indeed act merely as an agent for the cargo owner, entering into carriage contracts with ocean carriers (and land carriers) on the cargo owner's behalf. For example, in *Carrington Slipways Pty Ltd v. Patrick Operations Pty Ltd* (1991) 24 N.S.W.L.R. 745 (C.A.N.S.W.),

the New South Wales Court of Appeal held that an entity it described both as "freight forwarder" (*id.* at 749) and "forwarding agent" (*id.* at 747) had acted only as agent for the plaintiff cargo-owner when dealing with the ocean carrier who had actually carried the goods, and so could not be held liable as contracting carrier. *Id.* at 753.

This ambiguity about the meaning of the term "freight forwarder" means that judgments, opinions and briefs must be read with great care. Even within the United States, the term is not always used in the meaning given to it by Congress. Indeed, the ambiguity clouds the very question upon which the Court granted certiorari in the present case. Question 1 in the Petition for Writ of Certiorari uses the term "freight-forwarder" but it also speaks of a cargo owner contracting with such an entity "for transportation of goods to a destination in the United States."[8] If "freight forwarder" is being used there in the American statutory sense, then it is inappropriate to speak of contracting with such an entity *for transportation of goods*. One does not contract *for transportation* with a "freight forwarder" in the sense defined in 46 U.S.C. app. §1702(17)(A) and 46 C.F.R. §515.2(o)(1). Rather, a cargo owner contracts with a "freight forwarder" to arrange carriage for the cargo and to process the relevant documentation. Nevertheless, if "freight forwarder" means a forwarding *agent*, then the question obviously calls for an

[8] Petitioner's Brief on the Merits phrases Question 1 slightly differently, but with the same ambiguity: "Whether a cargo owner that contracts with a freight forwarder for transportation of goods to a destination in the United States is bound by the contracts that the freight forwarder makes with the carriers that actually transport the owner's good." Brief of Petitioner, p. i.

affirmative response, because the cargo owner would be bound by the contract made by its agent on its behalf. In contrast, if "freight forwarder" is being used in Question 1 in the less precise international sense that prevails in Australia (where the contract between Respondent Kirby and International Cargo Control Pty Ltd was made), then the answer can only be: "It depends on whether the freight forwarder contracted with the cargo owner as principal or agent."

That is, indeed, the answer that would be given to Question 1 in other countries. In *Comalco Aluminum Ltd v. Mogal Freight Services Pty Ltd* (1993) 113 A.L.R. 677, 698, the Federal Court of Australia said, quoting from the leading British text, CLIVE M. SCHMITTHOFF, SCHMITTHOFF'S EXPORT TRADE 249 (8th ed. 1986):

> A forwarder may act as a principal or as an agent. Historically, forwarders acted as agents on behalf of their customers but the practice has changed and in modern circumstances they often carry out other services, such as packing, warehousing, cartage, lighterage, insurance, or, in container transport, the groupage or consolidation of parcels of various customers into one container. Often they act as carriers. It follows that, in law, they may qualify more often as principals than as agents. Nevertheless, it has to be ascertained in every individual case in which legal capacity the forwarder acted. The answer depends on the construction of the contract between the

forwarder and his customer and the facts of the case.[9] (footnotes omitted).

To avoid confusion, *amicus* will adhere strictly to the meaning of the terms "freight forwarder" and "non-vessel-operating common carrier" (or NVOCC) as defined by Congress. The definition of "ocean freight forwarder" in the U.S. Code and Code of Federal Regulations refers only to a person who "in the United States" books or arranges space with common carriers on behalf of shippers. 46 U.S.C. app. §1702(17)(A); 46 C.F.R. §515.2(o)(1). Even so, *amicus* will use the term "freight forwarder" in this sense for all intermediaries of this kind, whether in the United States or abroad. The term NVOCC will be used to describe an intermediary who contracts as carrier.

Two points should be reiterated about *amicus'* use of the American terminology. First, it does not reflect the international understanding of the meaning of the term "freight forwarder" and it therefore may not match the usage in other briefs, including the Respondents' own. As always, this Court's ruling will decide the position under American law, so it seems appropriate to use American terminology. Secondly, according to the American meaning of the terms, International Cargo Control Pty Ltd seems to have been an NVOCC, not a freight forwarder. As a result, Question 1 is inappropriately phrased for the circumstances of the present case. Using American terminology, the question should be whether a cargo owner is bound by

[9] The current edition of the late Prof. Schmitthoff's treatise retains this passage in exactly the same terms. *See* LEO D'ARCY, CAROLE MURRAY & BARBARA CLEAVE, SCHMITTHOFF'S EXPORT TRADE 605-06 (10th ed. 2000).

the contracts that *an NVOCC* makes with ocean carriers for transportation of the cargo owner's goods.

II. An NVOCC cannot be an agent in the strict sense.

Petitioner and the U.S. Court of Appeals for the Ninth Circuit in *Kukje Hwajae Ins. Co. Ltd. v. M/V HYUNDAI LIBERTY,* 294 F.3d 1171, 1176 (9th Cir. 2002), *petition for cert. pending sub nom. Green Fire & Marine Ins. Co. Ltd. v. M/V HYUNDAI LIBERTY,* No. 02-813 (filed Nov. 22, 2002) quoted from a section of *amicus'* Tulane Law Review article that was concerned with the maritime doctrine of ratification. Martin Davies, *In Defense of Unpopular Virtues: Personification and Ratification*, 75 TUL. L. REV. 337, 374-403 (2000) (hereafter *Unpopular Virtues*). The doctrine applies in cases where someone other than the ship's owner issues a bill of lading for carriage of goods on a ship. For example, a time charterer of the carrying ship may issue a bill of lading in its own name, even though it is not the shipowner. The shipowner is not bound *in personam* by such a bill of lading, because it is not a party to the contract evidenced by it. However, the doctrine of ratification holds that the carrying ship may be held liable *in rem* on a bill of lading that was not issued by or on behalf of the shipowner. *See, e.g., Demsey & Assocs., Inc. v. S/S SEA STAR*, 461 F.2d 1009 (2d Cir. 1972); *Cavcar Co. v. M/V SUZDAL*, 723 F.2d 1096 (3d Cir. 1983); *Cactus Pipe & Supply, Co. v. M/V MONTMARTRE*, 756 F.2d 1103 (5th Cir. 1985).

One of the two theoretical explanations for the doctrine of ratification is that the person other than the shipowner who issued the bill of lading acted as agent on the ship's behalf or can subsequently be treated as having

acted as agent for the ship. *Unpopular Virtues,* 75 TUL. L. REV. at 379. *Amicus'* article explains that the doctrine of ratification cannot bind a ship *in rem* to a bill of lading issued by an NVOCC, because an NVOCC does not act as agent on the ship's behalf and cannot subsequently be treated as having acted as agent. *Id.* at 395-400. The relevant passage reads:

> The NVOCC is not authorised by the owner or master of the carrying ship to issue bills of lading that will bind the ship; indeed, the ocean carrier may have no idea that the person to whom it issued its bill is in fact an NVOCC that has issued bills of lading itself. The relationship between ocean carrier and NVOCC is therefore not one of agency, but is a contractual one embodied in the ocean carrier's bill of lading, under which the NVOCC is the shipper. The NVOCC does not contract with the owners of the goods as agent for the ship. Quite the reverse, it contracts with the ocean carrier as agent for the owners of the goods. *Id.* at 396.

Taken in context, the final sentence of this passage means no more than that an NVOCC is an intermediary engaged by the cargo owner rather than by the ocean carrier. As the commentary to the Restatement (Third) on Agency notes, "It is . . . common usage to refer without distinction to parties who serve any intermediary function as 'agents.'" RESTATEMENT (THIRD) ON AGENCY § 1.01 cmt. b (Tent. Draft No. 2, 2001). The sentence was not intended to suggest that an NVOCC is an agent in the strict sense, an intermediary authorized to act on the cargo owner's behalf, subject to the cargo owner's control, and having consented so to act. RESTATEMENT (SECOND) ON AGENCY § 1 (1958); RESTATEMENT (THIRD) ON AGENCY § 1.01 (Tent.

Draft No. 2, 2001). Nevertheless, that is the way it was incorrectly interpreted by the Ninth Circuit in *Kukje Hwajae Ins. Co.* 294 F.3d at 1176, and by Petitioner in the present case.

Under ordinary principles of agency law, the existence of a true agency relationship is a question of fact. *Wood v. Holiday Inns, Inc.*, 508 F.2d 167 (5th Cir. 1975); *Bartlett-Collins Co. v. Surinam Navigation Co.*, 381 F.2d 546, 550 (10th Cir. 1967). Not even a freight forwarder is always the agent of the cargo owner as a matter of law. *Strachan Shipping Co. v. Dresser Indus., Inc.*, 701 F.2d 483, 488 (5th Cir. 1983); *Constructores Tecnicos, S. de R.L. v. Sea-Land Serv., Inc.*, 945 F.2d 841, 846 (5th Cir. 1991); *Naviera Neptuna S.A. v. All Int'l Freight Forwarders*, 709 F.2d 663, 665 (11th Cir. 1983). When considering whether a freight forwarder in fact acts as agent for the cargo owner, circuit courts have regarded the cargo owner's right to control the manner in which the forwarder performs its duties as the most important factor. *Strachan Shipping,* 701 F.2d at 488; *Constructores Tecnicos,* 945 F.2d at 846.

Nothing in the FIATA Multimodal Transport Bill of Lading standard form (the FBL) makes the NVOCC (there referred to as "the Freight Forwarder") subject to the cargo owner's control in the selection of ocean carriers and nothing authorizes the NVOCC to bind the cargo owner to contracts with ocean carriers. On the contrary, cl. 2.1(a) provides that the NVOCC (referred to as "the Freight Forwarder") "undertakes to perform and/or *in his own name* to procure the performance of the entire transport." *See* JA 86, cl. 2.1(a) (emphasis added). That is not the language of agency. It is an acknowledgment that the NVOCC must sub-contract some or all of the carriage obligations it has undertaken because it does not operate

vessels itself, but that sub-contracting is done by the NVOCC in its own name, i.e., as principal not as agent.

The only reference to an agency relationship in the FBL is to be found in cl. 10.2, which states that in entering into the contract evidenced by the FBL, the NVOCC (referred to as "the Freight Forwarder") contracts "as agent or trustee" for any person "whose services have been used in order to perform the contract," which would include the ocean carriers who actually carry the goods. *See* JA 94, cl. 10.2. Thus, under the FBL form, the NVOCC actually purports to contract with the cargo owner as agent for the ocean carrier, rather than contracting with the ocean carrier as agent for the cargo owner.

As the Petitioner's Brief on the Merits acknowledges, cl. 10.2 is an attempt to make performing parties such as ocean carriers party to the contract between Respondent Kirby and International Cargo Control Pty Ltd. Petitioner's Brief on the Merits, pp. 13-14. This language of agency is included in the FBL to satisfy the requirements established by the House of Lords and Privy Council in a series of cases about the validity of Himalaya clauses. *Scruttons Ltd v. Midland Silicones, Ltd.* [1962] A.C. 446 (H.L., appeal taken from Eng.); *New Zealand Shipping Co. Ltd v. A.M. Satterthwaite & Co. Ltd* [1975] A.C. 154 (P.C.); *Port Jackson Stevedoring Pty Ltd v. Salmond & Spraggon (Aust.) Pty Ltd* [1980] 2 Lloyd's Rep. 317 (P.C.). Those cases established that a Himalaya clause works to extend the protection of a contract to a third party only if: (a) the terms of the clause make it clear that the third party is intended to be protected, (b) the terms of the clause make it clear that the carrier is contracting as agent for the third party, (c) the carrier has authority from the third party to do that, and (d) that the third party provides some

form of consideration to the plaintiff. *Scruttons Ltd* [1962] A.C. at 474. The inclusion of cl. 10.2 of the FBL is clearly designed to satisfy requirement (b) for the purposes of English law. Whatever the purpose of cl. 10.2, it plainly does not amount to authorization of the NVOCC to act as agent *for the cargo owner* when dealing with sub-contractors and other performing parties.

True agency creates a fiduciary relationship. RESTATEMENT (SECOND) ON AGENCY § 13 (1958) ("An agent is a fiduciary with respect to matters within the scope of his agency"). Ordinarily, the fiduciary nature of the principal/agent relationship requires the agent to provide the principal with any information relevant to the affairs entrusted to it, and to give to the principal any profit made by the agent in connection with the transactions conducted by it on behalf of the principal. RESTATEMENT (SECOND) ON AGENCY §§ 381, 388 (1958). Thus, if an NVOCC were an agent of the cargo owner in the strict sense, it would be obliged to disclose to the cargo owner the freight rate charged to it by the ocean carrier, and to disgorge to the cargo owner any profit it made out of the transaction. That is definitely not what happens in the relationship between an NVOCC and a cargo owner. The NVOCC charges the cargo owner freight at the rate set in its own tariff, and is charged freight at the rate charged to it by the ocean carrier; it keeps the profit that lies in the difference between the two freight rates. GERALD H. ULLMAN, U.S. REGULATION OF OCEAN TRANSPORTATION UNDER THE SHIPPING ACT 1984, 121 (1995).

To hold that a cargo owner is *always* bound as a matter of law by the contracts made between an NVOCC and an ocean carrier would lead to undesirable consequences. It would mean, for example, that the cargo owner

would always be liable to the ocean carrier for the freight under the ocean carrier's bill of lading, even though it has already paid freight in full to the NVOCC. When a cargo owner pays freight to a freight forwarder but the freight forwarder does not pay the ocean carrier, the cargo owner remains liable to the ocean carrier (unless released by the carrier), with the result that the cargo owner may be forced to pay freight twice. *Bartlett-Collins Co. v. Surinam Navigation Co.*, 381 F.2d 546, 550 (10th Cir. 1967); *Strachan Shipping Co. v. Dresser Indus., Inc.*, 701 F.2d 483 (5th Cir. 1983); *National Shipping Co. of Saudi Arabia v. Omni Lines, Inc.*, 106 F.3d 1544 (11th Cir. 1997). That result, although harsh on the cargo owner, is appropriate when the cargo owner is dealing with a freight forwarder, because the cargo owner knows that it is paying freight to its agent, with instructions to pass the freight on to the carrier. The cargo owner's single freight obligation is not satisfied until the freight payment reaches the carrier's hands. In contrast, to hold the cargo owner liable to the ocean carrier would be wholly inappropriate when the cargo owner is dealing with an NVOCC, who has contracted as principal to carry the cargo owner's goods to their destination and who has charged freight itself for that task. If Question 1 is answered in the affirmative, the cargo owner will always have two freight *obligations* in respect of the same carriage of goods: one to the NVOCC and one to the ocean carrier.

III. This Court's previous decisions do not dictate an affirmative answer to Question 1.

Petitioner relies on four Supreme Court cases, which it says require an affirmative answer to Question 1. *New Jersey Steam Navigation Co. v. Merchant's Bank of Boston*,

47 U.S. (6 How.) 344 (1848); *York Co. v. Central R.R.*, 70 U.S. (3 Wall.) 107 (1865); *Great Northern Ry. Co. v. O'Connor*, 232 U.S. 508 (1914); *Chicago, Milwaukee, St. Paul & Pac. R.R. v. Acme Fast Freight, Inc.*, 336 U.S. 465 (1949). None of those cases was concerned with an intermediary that had issued its own bill of lading declaring itself to be the carrier, as International Cargo Control Pty Ltd did in the present case. In none of the cases did this Court declare as a matter of law that an entity with the same characteristics as an NVOCC is always agent for the cargo owner, no matter what the terms of the agreement between them.

In *New Jersey Steam Navigation Co. v. Merchant's Bank of Boston*, 47 U.S. (6 How.) 344 (1848), the cargo owner had "employed Harnden [the intermediary] to collect checks and drafts on the banks in the city of New York, and to bring home the proceedings in specie." 47 U.S. (6 How.) at 380. The report does not dwell on the nature of the relationship between the cargo owner and Harnden, and there is no mention in the report of Harnden issuing his own bill of lading for the carriage, declaring himself to be the carrier. This Court said of Harnden: "He had no interest in the money, or in the contract with the [ocean carrier] for its conveyance, except what was derived from the possession [of the goods] in the execution of his agency." *Id*. This Court's conclusion that the cargo owner was bound by the ocean carrier's contract thus seems to have been based on a conclusion that Harnden was the cargo owner's agent in fact, rather than on a rule that he must be regarded as an agent as a matter of law, no matter what his relationship with the cargo owner.

In *York Co. v. Central R.R.*, 70 U.S. (3 Wall.) 107 (1865), both sides accepted that the intermediary, Trout &

Son, was "but agents of the York Company," to use the words of the defendant's objection in error. 70 U.S. (3 Wall.) at 108. Trout & Son did not purport to be the carrier of the cargo owner's goods and did not itself issue a bill of lading evidencing a contract for carriage of the goods to their destination. The core of the dispute was whether Trout & Son, as agent, "was authorized to stipulate for any limitation of responsibility on the part of that company [meaning the carrier]." *Id.* at 113. This Court held that the cargo owner was bound by the contract made on its behalf by Trout & Son because "it nowhere appears that the agents disclosed their agency when contracting for the transportation of the cotton." *Id.* at 113. As in *New Jersey Steam*, the intermediary was in fact an agent; it was not found to be an agent despite having contracted as carrier.

Similarly, in *Great Northern Ry. Co. v. O'Connor*, 232 U.S. 508 (1914), the cargo owner's complaint was that the intermediary, Boyd Transfer Co., had exceeded its authority by entering into a contract with a carrier on terms that limited the carrier's liability. Although Boyd Transfer Co. did do business as a common carrier, "in addition to its regular transfer business [it] acted as a forwarder by railroad." 232 U.S. at 509. The trial judge found as fact that "the Boyd Company was the agent of the plaintiff in making the shipment, and its acts bound her." *O'Connor v. Great Northern Ry. Co.*, 136 N.W. 743, 744 (Minn. 1912), *rev'd, Great Northern Ry. Co. v. O'Connor*, 232 U.S. 508 (1914). The relationship between the cargo owner and Boyd Transfer Co. was "on terms not stated" (232 U.S. at 509), but the report does not mention any bill of lading issued by Boyd Transfer Co. or any other evidence of a carriage contract between Boyd Transfer Co. and the cargo owner. This Court was concerned with the extent of Boyd

Transfer Co.'s authority as agent in fact; it did not declare that Boyd Transfer Co. must be regarded as an agent because of some inflexible rule of law.

In *Chicago, Milwaukee, St. Paul & Pac. R.R. v. Acme Fast Freight, Inc.*, 336 U.S. 465 (1949), the question was "whether the right-over given by §20(12) [of the Carmack Amendment, then 49 U.S.C. §20(12)] to an initial carrier against its connecting carriers applies in the case of forwarders who have paid loss and damage claims to their shippers and seek recompense from the carrier responsible for the loss." 336 U.S. at 469. This Court answered that question in the negative. *Id.* at 489. Although this Court referred throughout to "forwarders" it was not considering intermediaries of a kind similar to the "ocean freight forwarder" defined in 46 U.S.C. app. §1702(17)(A) and 46 C.F.R. §515.2(o)(1). This Court said: "The forwarder has some of the characteristics of both carrier and shipper. In its relations with its customers, a forwarder is subjected by the Act to many of the requirements and regulations applicable to common carriers . . . In its relations with these carriers, however, the status of the forwarder is still that of shipper." 336 U.S. at 467-68. The Court thus appeared to be considering what would now be called an NVOCC in the context of ocean carriage, an intermediary who contracts as principal with both cargo owner and actual carrier. 46 U.S.C. app. §1702(17)(B).

The *Acme Fast Freight* Court was solely concerned with the question whether the intermediary could recover the full amount of a loss and damage claim it had paid to the cargo owner, by operation of the statutory "back to back" indemnity in the Carmack Amendment. The Court's negative answer to that question as a matter of statutory interpretation meant that the intermediary's recovery

from the carrier was limited by the terms of the contract between them, because the Forwarder's Act did not give them "relief from the requirement that they file their claims against carriers like other shippers." 336 U.S. at 487. The Court had no reason to consider the question whether an NVOCC-like intermediary must always, as a matter of law, be held to be the cargo owner's agent when contracting with the actual carrier. The Court did say that "shippers by freight forwarder have for many years been permitted to sue underlying carriers for loss or damage occasioned by the latter" (336 U.S. at 487 n.27) but that was *obiter dicta* that simply referred to the result in *New Jersey Steam Navigation Co. v. Merchant's Bank of Boston*, 47 U.S. (6 How.) 344 (1848), and *Great Northern Ry. Co. v. O'Connor*, 232 U.S. 508 (1914). That is a very thin reed upon which to build a rule that a cargo owner must *always* be bound by the contract made between an NVOCC and an ocean carrier.

This Court's own jurisprudence does not require an affirmative answer to Question 1. An affirmative answer would impose an agency relationship in all cases as a matter of law, regardless of the actual nature of the relationship between cargo owner and NVOCC, and despite the fact that the cargo owner/NVOCC relationship is usually not one of control and fiduciary obligation, the qualities that normally typify agency. There is no reason to adopt a rule that flies in the face of the facts in this way, and several good reasons not to.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted,

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